No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

In Error to the United States District Court for the Northern District of California, Second Division.

HOEFLER, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,
Attorneys for Defendant in Error.

INDEX

No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

In its supplemental brief plaintiff in error has not maintained the order established in its opening brief. Nevertheless, in writing this reply, we have endeavored to segregate the various arguments contained in plaintiff in error's supplemental brief so as to answer them in the same subdivisions into which our brief now on file is divided; therefore, this brief will be subdivided in the same manner as the brief first filed.

The contentions made in the supplemental brief of plaintiff in error based upon the claim that the rates to the more distant points were established by the Commission, and the contentions based upon the assumption that established rates cannot be deviated from by charging less will be replied to under the sixth head commencing at page 56.

1. That the long and short haul provision of the Constitution of 1879 does not in terms attempt to regulate interstate commerce, and even if it were susceptible of such construction, it could not be said that the people would not have prohibited the charging of more for the short than for the longer haul within California had they known that they could not enforce such a prohibition in the case of interstate commerce.

No attempt is made in the supplemental brief of plaintiff in error to answer the argument made under this head of the brief of defendant in error. At the conclusion of its supplemental brief plaintiff in error states that it "does not concede, by silence, any of the arguments urged by counsel." Counsel say the purpose of the supplemental brief "was merely to discuss some of the more salient features of our case." We were under the impression that counsel for plaintiff in error supposed the contention replied to under this head was one of the more salient features of the case.

The case of *Wabash Etc. Co.* v. *Illinois,* 118 U. S. 557, cited by plaintiff in error in support of its contention was a case involving interstate shipments. In that case the Supreme Court of Illinois has held that a provision of any Illinois Statute similar in its general effect to our constitutional provision governed the rates on shipments to points in other states. It was alleged in the complaint that the Wabash Company charged Elder & McKinney for transportation from Peoria, Illinois, to New York City, the sum of $39.00, being at the rate of 15 cents per hundred pounds for the shipment, and that on the same day they agreed to transport for Isaac Bailey and F. O. Swanell, a shipment from Gilman, Illinois, to New York City, for which they charged the sum of $65.00,

or a rate of 25 cents per hundred pounds. It was further alleged that the Elder & McKinney shipment was transported 86 miles further in Illinois than the last mentioned shipment. Gilman is a town in Illinois 86 miles nearer the eastern boundary of the State than Peoria is.

The provision of the Kentucky Constitution under consideration by the United States Supreme Court in *Louisville and N. Ry. Co.* v. *Kentucky,* 183 U. S. 503, was as follows:

> "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Railroad Commission, such common carrier, or person or corporation owning or operating a railroad in this State, may, in special cases after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this Section."

The foregoing provision was contained in Section 218 of the Constitution.

It will be noted that it was subject to be distorted in the same way that the California Constitution is sought to be distorted here. It could have been argued with the same force there as here that the Constitution was violated because a carrier charged a lesser amount to a point without the State. In the case of *Louisville and N. Ry. Co.* v. *Kentucky, supra,* the railroad company had been indicted and fined for charging a greater amount for transportation for a shorter than for a longer distance, the short haul and long haul points both being within the State. Undoubtedly the constitutional provision was subject to the distorted construction that rates to a point within the State of Kentucky should not be higher than those charged to a point on the same line beyond the state boundary. In fact, a county court of Kentucky in an action commenced by one Eubank against the Louisville and Nashville Railway Company, had so held. This decision was reversed by the United States Supreme Court in *Louisville and Nashville Ry. Co.* v. *Eubank,* 184, U. S. 27.

In reversing the judgment of the County Court, the Supreme Court said:

> "We are of opinion that *as construed by the State Court,* and in so far as it is made applicable to or affects interstate commerce, Section 218 of the Constitution of Kentucky is invalid, and the judgment of the Circuit Court of Simpson County, Kentucky, is therefore reversed."

The case of *Louisville and Nashville Ry. Co.* v. *Eubank, supra,* is referred to at length at page 97 of the supplemental brief of plaintiff in error.

But it apparently never occured to the railroad company in *Louisville and N. Ry. Co.* v. *Kentucky,* 183, U. S. 503, *supra,* to contend, *because rates within the State could not be based on interstate rates, that the people of Kentucky would not have enacted the provision insofar as it related to cases where the short and long haul points were both within the State of Kentucky.* The railroad company did contend, however, that the constitutional provision "operated as an interference with interstate commerce and is therefore void." In ruling on this contention the Supreme Court said that it *was apparent the long and short haul distances mentioned were distances upon the railroad within the State.* The Court said:

> "The final contention, that Section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long. It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, *and the long and short haul distances mentioned are evidently distances upon the railroad within the State.* The particular case before us is one involving the transportation of coal from one point in the State of Kentucky to another by a corporation of that State."

The judgment of the Court of Appeals of Kentucky was affirmed by the Supreme Court.

2. The long and short haul clause of the Constitution of 1879 and the long and short haul clause of the Constitution as amended October 10, 1911, do not violate the Federal Constitution.

No further argument in support of plaintiff in error's contention is made in its supplemental brief.

3. A person who is required to pay more than the legal charge for transportation of freight has a common law right to recover the overcharge, and in addition to such common law right has the statutory right conferred by the Statutes of 1909, 1911, and the Public Utilities Act.

In referring to the argument made under this head of our brief, counsel for plaintiff in error state:

> "Beginning at the bottom of page 65 of the brief of defendant in error, its counsel, evidently realizing that it would be futile to contend that there was any right of action at common law, seeks to found his action herein upon the non-discriminatory sections of the California Constitution and statutes."

We certainly have not "realized" that the liability of the plaintiff in error to refund the overcharges in this case is not enforceable on common law principles. This matter is fully discussed at pages 40 to 57 of our brief. As said by Mr. Justice Blackburn in *Great Western Ry. Co.* v. *Sutton,* 4 Eng. & Ir. App. 236:

> *"I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable."*

The decision of Mr. Justice Blackburn was affirmed by the House of Lords (L. R. 4 H. L. 226). In deliv-

ering the opinion, Lord Chelmsford said:

> "The last subject to be considered is the form of the action; whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely but relatively to the charges made to other persons. It was argued for the defendants that the charge upon the plaintiff's packed parcels, being warranted by the 10 and 11 Vict., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge."

As pointed out at pages 40 et seq. of our brief, the argument of plaintiff in error is based upon the erroneous assumption that because (as held in *Cowden* v. *P. C. S. S. Co.,* 94 Cal. 470) discrimination was not contrary to the common law, a common law remedy is not open to a person who is overcharged by discrimination after discrimination has been made unlawful by statute.

Referring to *Great Western Ry. Co.* v. *Sutton,* 4 Eng. & Ir. App. 236; L. R. 4 H. L. 226, *supra,* counsel for plaintiff in error state:

> "The reasoning of the English court is founded entirely upon the supposition that the mere prohibition of the statute created an obligation to charge equally under the same circumstances, which obligation could be enforced by

> the action for money had and received. That this is not the law in the United States we think is shown by the cases cited in our brief to the effect that a mere statutory prohibition creating a duty or obligation unknown to the common law does not give rise to a right of action unless the same or another statute so prescribes; and further that where the legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no provate action will lie for a violation of a prohibition as to which suit by the State is the only prescribed means of enforcement."

The provision of the Constitution as it existed prior to the amendment of October 10, 1911, was not a prohibition but an affirmative provision that property should be transported to the less distant point at charges not exceeding those made to the more distant point.

By the provisions of Section 21, both before and after the amendment of October 10, 1911, *charges in excess of a certain standard were made unlawful.* The standard established was not a standard which existed at common law. The cases cited by plaintiff in error absolutely fail to sustain its contention that where a statute prohibits charges in excess of a certain standard no action lies to recover charges exacted in excess of such a standard, unless the statute so provides. The cases cited by plaintiff in error, commencing with *Ward* v. *Severance,* 7 Cal. 126, are fully discussed at pages 49 et seq. of our brief. Not only do these cases fail to sustain such contention but by implication they all hold contrary thereto. In *Savings Association* v. *O'Brien,* 51 Hun. 45, the second case cited, where the Court had under consideration a

statute imposing a liability on stockholders of a corporation, the Court said:

> "A general liability created by statute without a remedy may be enforced by a common law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

It might be argued here with equal force that a statute requiring carriers to file their tariffs and prohibiting charges in excess of the tariff rate would not of its own force confer upon a person required to pay in excess of the tariff rate the common law right of action to recover the overcharge. There is nothing in the common law prohibiting a carrier from charging in excess of its tariff rates, but when a statute prohibits charges in excess thereof, it necessarily follows, in a case where the statute is violated, that a common law action to recover the overcharge is maintainable, just as under the common law an action is maintainable to recover the excess over a reasonable charge. Counsel have confused the right and the remedy to enforce the violation of the right. It does not follow because a right is a statutory one that a violation thereof is not enforceable by a common law remedy.

The foregoing quotation from the supplemental brief of plaintiff in error concludes with a reference to the penalty provided by Section 22 of Article XII of the Constitution before its amendment on October 10, 1911. It is said "that where the Legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no private action will lie for a violation of the prohibition as to which suit by the State is the only pre-

scribed means of enforcement." The provision of the Constitution referred to is as follows:

> "Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the Commission, shall be fined not exceeding twenty thousand dollars for each offense."

Counsel contend that this penalty is "exclusive" and that a person charged in excess of the rates established by the Commission has no cause of action to recover the overcharge. This contention is palpably unsound. After providing for such penalty Section 22 of Article XII provides:

> "In any action against such corporation or company for damages sustained by charging excessive rates, the plaintiff, in addition to the actual damages, may, in the discretion of the judge or jury, recover exemplary damages. * * * Nothing in this section shall prevent individuals from maintaining actions against any of such companies."

Clearly by the term "excessive rates" was meant rates in excess of the standard prescribed by the Constitution. The term comprised not only charges in excess of the provision of Section 21 requiring carriers to transport property to less distant points at charges not exceeding the charges to more distant points, but also comprised charges in excess of the rates established by the Commission.

Counsel for plaintiff in error state (p. 92):

> "In citing the *Sutton* case counsel entirely dis-

> regards the fact that when the State of California established a public agency for the regulation of rates, which could not be deviated from except under extreme penalties, and continued that regulation in force by the appointment of a commission and by acquiescence in the action of such commission, the reason for the rule laid down in the *Sutton* case entirely ceased."

The Sutton case was cited to the point that where a statute fixed a certain standard of rates and rates in excess of the standard so fixed were charged by a carrier, the person required to pay such rates has a common law right of action to recover the excess over the standard fixed by the statute.

We presume the above quoted excerpt is merely another way of stating the oft-repeated contention that the Commission could establish rates which violated the provisions of Section 21 of the Constitution.

We supposed the contention that plaintiff's assignors had no common law right of action assumed (for the sake of the argument at least) that a higher rate could not be lawfully charged for the shorter distance for unless such assumption is indulged in plaintiff in error might as well have not made the contention. It is, we submit, illogical and confusing to attempt to support this contention by advancing arguments in its support which assume a condition which, if it existed, would render it unnecessary to make the contention at all.

At page 91 of the supplemental brief of plaintiff in error there is a quotation from the opinion of the Supreme Court of Massachusetts in the case of *Fitchburg Railroad Co.* v. *Gage,* 78 Mass. 393, 12 Gray 393.

In that case, which was an action to recover freight charges, the defendant by set-off sought to recover an alleged overpayment. The defendant alleged that the plaintiff charged other shippers a lower rate for the transportation of brick than it charged defendant for the transportation of ice and sought to set-off the excess against the claim of the plaintiff. The report does not disclose the titles of the "recent English cases" cited by the defendant and referred to in the opinion of the Court. The opinion, however, states that they are "chiefly commentories on the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there," and that they "are not to be regarded as authoritative expositions of the common law on these subjects." Whether the *Sutton* case was one of the cases cited we do not know. It is very certain, however, that the *Sutton* case in addition to construing the statute under consideration also contained an exposition of the common law. We are not here concerned with the construction of the English statute and the case is cited by defendant in error solely because of its exposition of the common law.

At page 93 of their supplemental brief counsel for plaintiff in error state that the case of *L. & N. Ry. Co.* v. *Walker,* 63 S. W. 20, 110 Ky. 961, may be differentiated from the case at bar because the Kentucky statute gave to the party aggrieved a right of action for damages for unjust or unreasonable preferences or discrimination. So do the statutes of 1909, 1911 and the present Public Utilities Act. This case is direct authority to the effect that this action is maintainable under the provisions of these statutes as pointed out at pages 37 et seq. of our brief, and that

the measure of damages is the difference between the rate charged and the rate that should have been charged.

Counsel state at page 82 of their supplemental brief that it has been uniformly held by the Interstate Commerce Commission and by the courts that proof of discrimination is not sufficient to entitle the complainant to recover.

As pointed out at pages 66 et seq. of our brief, whether the measure of damages appears upon proof of discrimination *depends upon the nature of the discrimination proved. The charging of more for the shorter than for the longer distance is discrimination of a specific kind. The prohibition against so charging renders the charge unlawful, and in the nature of things, the difference between the amount charged in violation of the prohibition and that which would have been charged had there been no violation is the measure of damages.* In *Penn. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, the measure of damages did not appear from the proof of the discrimination. The plaintiff in that case, who paid the lawful tariff rate, proved that another shipper was accorded an unlawfully low rate. In view of the requirement of the Interstate Commerce Act that a charge less than the tariff rate was illegal, it necessarily followed that if the measure of damages was the difference between such rates that plaintiff, in effect, was suing to recover the same illegal rebate.

So in *New Orleans Board of Trade* v. *I. C. R. R. Co.,* 29 I. C. C. 32, and in *Spiegel* v. *Southern Ry.,* 31 I. C. C. 687, cited by plaintiff in error, the dis-

crimination involved was not of such a nature that the amount of the damages sustained appeared upon proof of the discrimination. In *New Orleans Board of Trade* v. *I. C. R. R. Co., supra,* the complainants who shipped tobacco from Kentucky points to New Orleans for shipment to Bristol were charged more than their competitors who shipped to Liverpool. It appeared that the steamship companies absorbed this difference and that in reality it did not cost the complainants any more to transport this tobacco to England than it did their competitors.

The case of *Lehigh Valley R. Co.* v. *Clark,* 207 Fed. 717, cited by counsel, was impliedly overruled by the Supreme Court in *Meeker* v. *Lehigh Valley R. Co.,* 35 Sup. Ct. Rep. 328, decided on the 23rd day of last February. It is also contrary to the decision of this Court rendered on the 1st of last February in the case of *Southern Pacific Company* v. *Goldfield Consolidated Milling and Transportation Co.,* 220 Fed. 14. It is very apparent that the decision in the case of *Lehigh Valley R. Co.* v. *Clark,* 207 Fed. 717, *supra,* was the result of a misapplication of the language employed by the Supreme Court in the case of *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184. In the case of *Meeker* v. *Lehigh Valley R. Co.,* 35 Sup. Ct. Rep. 328, 335, *supra,* the Supreme Court said:

> "But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (2) that by reason of the unjust dis-

> crimination resulting from giving the rebate to the Lehigh Valley Coal Company Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages."

It will be noted that in the *Meeker case* the Supreme Court held that even in a case of discrimination by giving rebates where the plaintiff was charged the lawful rate it was permissible to measure his damages by the difference between the lawful rate which he paid and the unlawful rate accorded the favored shipper.

That the measure of damages in discrimination of the kind here involved is the difference between higher rate to the intermediate point and the lower rate to the more distant point clearly appears by implication from the case of *Darnell-Taenzer Lumber Co.* v. *Southern Pacific Company,* 221 Fed. 890 (C. C. A.) which is cited at page 86 of the supplemental brief of plaintiff in error. This case was decided on April 6, 1915, after the decision of the Supreme Court of that *Meeker* case. The *Darnell-Taenzer* case was an action upon an award of reparation by the Interstate Commerce Commission. After referring to the decision in the *Meeker* case to the effect that the dif-

ference between the rate charged and a reasonable rate is the normal measure of damage the Circuit Court of Appeals for the Sixth Circuit said:

> "Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter *there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful.*"

So in the case at bar the charging of a higher rate to the less distant point was *ipso facto* unlawful. The charging of such a rate is discrimination, but it is not discrimination of the nature involved in the charging of a less than lawful rate to a favored shipper. As held by the Circuit Court of Appeals for the Sixth Circuit, the reason why in the last mentioned case the difference between the two charges is not *prima facie* the measure of damages is that it was not unlawful to charge the plaintiff the published tariff rate. But in the case at bar the charges were unlawful because in direct violation of the Constitution.

Nix v. *Southern Railway,* 31 I. C. C. 145, the syllabus of which is quoted by plaintiff in error at page 84, was primarily a proceeding before the Commission to have the rates on apples from Virginia to eastern cities reduced on the ground that they were unreasonable and discriminatory. Incidentally reparation was claimed on some shipments because of an alleged violation of the Fourth Section of the Interstate Commerce Act. From reading the decision it is difficult to determine whether the complainants actually paid

charges maintained in violation of the Fourth Section or whether they were complaining merely because other shippers at more distant points were accorded lower rates (p. 149). The only case cited by the Commission was *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, and as we have repeatedly pointed out that case is not authority here.

In the *International* case the rate charged was the lawful rate whereas a rate charged in violation of the long and short haul provision is an unlawful rate. In the *International* case the plaintiff was in effect suing to obtain a rebate, whereas in this case he is suing to recover the difference between the lawful and the unlawful rate. In the *International* case in the brief of counsel for the carrier, it was said: "This payment represented a charge which the one party was legally obliged to ask and the other one legally obliged to pay." In this case the charge is one made in direct violation of the law. In the *International* case the Supreme Court said that to adopt the rule contended for by the plaintiff in that case and to "arbitrarily measure damages by rebates, would create a legalized but endless chain of departures from tariffs; would extend the effect of the original crime." In this case the measuring of the damages by the difference between the two rates would create no departure from any tariff which conformed to the law. It would not "destroy the equality or certainty of rates" but on the contrary would make the rates conform to the express requirement of the Constitution. In the *International* case the Court said that plaintiff's contention "would make the carrier liable to damages beyond those inflicted and to persons not injured," but in this case the measure of damages in-

sisted upon here would not make the carrier liable for damages beyond those inflicted nor to persons not injured, for if the carrier had not violated the law, the shipper would not have been charged more for the shorter distance. In the *International* case the Court said that if the measure of damages contended for were correct the payment of damages for a violation of the law against rebates might be used as a means of paying rebates under the name of damages. But in this case the refund of the difference between the rate collected and that which should have been collected does not constitute a rebate as a rebate is a drawback from the lawful rate.

The long and short haul provision of Section 21 before its amendment was adopted from the Constitution of Pennsylvania of 1873 (Sec. 3, Article XVII) and that provision of the Pennsylvania Constitution was taken from an Act of the Legislature of Pennsylvania (March 7, 1861, P. L. 88) which provided that the local rates from Pittsburg and Philadelphia to intermediate points should at no time exceed the rate from Pittsburg to Philadelphia or from Philadelphia to Pittsburg. (*Central Iron Works* v. *P. R. R.*, 17 Pa. Ct. 652.)

In *Central Iron Works* v. *P. R. R.,* 17 Pa. Ct. 652, *supra,* decided under the provisions of the Constitution of Pennsylvania, from which the provisions of our Constitution were derived, the Court held that a person who was charged more for the shorter haul could maintain concurrently an action at law to recover the *overcharge* and a suit in equity to enjoin the carrier from thereafter making a greater charge for the shorter haul.

Moreover, Section 21 of the Constitution as it existed before the amendment, expressly conferred upon the shipper the right to have his property transported to the less distant point at charges not exceeding those maintained to the more distant point. It not only made it unlawful to charge a higher rate for the lesser distance, but expressly provided that the lower rate for the greater distance should be the rate for the lesser distance. On October 10, 1911, the phraseology of Section 21 was changed. The purpose of the amendment was to legalize a higher rate for the shorter distance in special cases, where after investigation the Commission should so authorize. Clearly the people intended no change other than this. If they had intended that the right of a shipper existing prior to the amendment to have his property transported at charges not exceeding the charges made to the more distant point, such a fundamental change in the law would have been clearly evidenced. The measure of damages of a person who was injured by a violation of the section before its amendment was fixed by the very language of the section itself. The amendment of October 10, 1911, clearly did not change that measure.

The case of *Osborne* v. *C. and N. W. Ry. Co.,* 48 Fed. 49, was cited because of the language used by Judge Shiras in charging the jury. This was an action to recover damages for an alleged violation of the long and short haul clause of the Interstate Commerce Act. The jury were instructed that if the defendant charged more for a shorter distance, under substantially similar circumstances and conditions, the measure of damages of the person required to pay such higher charges was the difference between the rate

which he paid and the lower rate to the more distant point. As stated at page 53 of our brief, the Circuit Court of Appeals reversed the judgment upon the ground that the evidence showed that no greater charge had been made for the shorter distance.

The statement at page 94 of the supplemental brief of plaintiff in error that the case got into the United States Supreme Court under the title of *Parsons* v. *C. and N. W. Ry. Co.,* 167 U. S. 447, is incorrect. The *Parsons* case was a somewhat analogous but different case. In the *Parsons* case judgment was rendered in favor of the defendant on demurrer to the complaint and the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals. In the *Osborne* and *Junod* cases, judgment was rendered in favor of the plaintiffs in the trial court and those judgments were reversed by the Circuit Court of Appeals upon the ground already stated. So in the *Parsons* case, the judgment of the Circuit Court of Appeals was affirmed upon the ground that the complaint did not show a violation of the long and short haul clause of the 4th section of the Interstate Commerce Act. Referring to the complaint, the Supreme Court said (page 456):

> "Nowhere in these counts is there an allegation as to the through rates from Nebraska or Iowa points to the four above-named eastern cities, or to any other place beyond the eastern terminus of defendant's road. There is nothing, therefore, to show *that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same*

four places. No figures as to the through rate are given; no averments as to its relation to the local rates on the defendant's road, whether from Nebraska or Iowa to Chicago. So that if we regard this tariff as being (what on its face it purports to be) a joint tariff, *there is no violation of the fourth section of the interstate commerce act, the one containing the long and short haul clause.*

"But it is said that there is an averment that the fixing or naming of Turner and Rochelle as the pretended termini of the shipments of corn and oats under the special tariff was a mere device to evade the law; that they were not grain markets, and had no elevators or facilities for handling grain, and that the grain was intended to be, and was in fact, transported by the defendant to Chicago, and there sold on the market or delivered to connecting roads for eastern points. It is this averment which introduces some uncertainty into the case. For if there had been no agreement between the defendant and eastern companies, and no through rates established thereby from Nebraska to the four places named, and this putting forth of the so-called joint tariff was a mere device, under color of which the defendant was shipping grain over its own lines from Nebraska to Chicago only, at less rates than were charged to the nearer points in Iowa, *there would have been a violation of the long and short haul clause.* But the trouble is the pleader does not distinctly make such a case."

Further the Supreme Court said:

"It is true also that he alleges that when transported to Chicago the grain was sold on the market or delivered to connecting roads for eastern seaboard points. But which, he does not advise us. If the former, that might happen by the shipper's intercepting at Chicago a shipment

> made under the joint tariff through to one of the four eastern points; if the latter, it would necessarily occur if the shipment was under such tariff. So the former is consistent with and the latter implies the joint tariff. *Neither makes certain any violation of the long and short haul clause.*"

In the *Parsons* case the plaintiff shipped corn from a point in Iowa to Chicago. The freight was transported to Chicago by the defendant railway company. As pointed out by the Supreme Court the complaint did not allege that defendant transported corn from Nebraska points to Chicago at a lower rate than the rate paid by plaintiff. It merely alleged that the rate from Nebraska points to Turner and Rochelle (junction points west of Chicago) was less than the rate paid by plaintiff; but the Turner and Rochelle rate *was merely a part of a through joint rate to eastern seaboard points.* It was not in fact the rate to Turner and Rochelle at all. The Supreme Court said (page 457):

> "That the portion of the through rate received by one of the companies party thereto may be less than the local rate, is not questioned."

The Supreme Court assumed in the *Parsons* case that plaintiff would have been entitled to recover the difference between the rate which he paid to Chicago and any lesser rate which he could prove that Nebraska shippers paid on shipments to Chicago.

The Supreme Court expressly stated that if Parsons had shipped to New York and paid higher rate from the Iowa point than the Nebraska shippers paid for the longer distance, he would have been entitled to recover the excess.

As before stated, the plaintiff shipped all his corn to Chicago. Referring to the allegation of his complaint that the joint through tariff was not filed with the Commission and that he did not know of its existence, the Supreme Court said:

> "The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff."

Further the Court said:

> "Every fact which he alleges might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago."

The Court then held that if Parsons had shipped to the more distant point and paid a higher rate than the rate from Nebraska to the more distant point he would have been entitled to recover the excess. The Court said (page 460):

> *"If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the*

extra sum he might have been charged if he had shipped."

This statement is a *dictum* but it is a *dictum* uttered in full view of the fact that the *Parsons* case was an action for damages under Section 8 of the Interstate Commerce Act, and moreover it is in accord with the decision of every court which has passed upon a similar question.

It will be noted that the long and short haul clause of the Interstate Commerce Act under consideration by the Supreme Court in the *Parsons* case made it unlawful to charge more for a shorter than for a longer distance irrespective of whether a lesser charge was made to a more distant point. In this respect it is similar to the amended Section 22 of Article XII of the Constitution of California. The long and short haul clause before the amendment of October 10, 1911, did not go to that extent. This difference may be illustrated by supposing a case where a higher rate was charged from Fresno to San Francisco than was charged from Bakerfield to San Francisco. The higher rate from Fresno to San Francisco would not have violated Section 21 before the amendment as there was no lower rate to any more distant point; but it would have violated the prohibition of Section 21 as amended October 10, 1911. In this action a lower rate was charged to a more distant point in every case.

At page 96 of its supplemental brief plaintiff in error quotes the statement of the Supreme Court in the *Parsons* case to the effect that before a party can recover under the Interstate Commerce Act he must show not merely the wrong of the carrier, but that

that wrong has in fact opened to his injury and say "This language is significant in the case at bar because neither injury or damage to plaintiff or its assignors is pleaded or proved here."

In view of the decision of the Supreme Court in the *Parsons* case that no violation of the Act was stated in the complaint and the further statement that if plaintiff had been charged more for the shorter distance he would have been entitled to recover the excess over the charge for the longer distance, the language quoted is indeed significant, but not in the way that counsel for plaintiff in error contend. *It conclusively shows that in the case of an overcharge the Supreme Court deemed the measure of damage under Section* 8 *of the Act to Regulate Commerce was the excess over the charge that would have been collected if the Act had not been violated.*

Where a charge in excess of the tariff is collected or where a charge in excess of the standard fixed by the long and short haul clause is collected, the person from whom it is collected can recover it either as an overcharge or as damages under the statutes. It is wholly immaterial whether we designate the excess over the lawful charge as an overcharge or as damages. A shipper who has been overcharged is necessarily damaged to the extent of the overcharge.

Union Pacific v. *Goodridge*, 149 U. S. 680, was an action brought to recover damages under an act of the Legislature of Colorado which provided that:

> "No railroad corporation, shall without the written approval of the said Commission, charge, demand or receive from any person, company or

> corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall * * * charge, demand or receive from any other person * * * for a like service * * * and all concessions of rates, drawbacks and contracts for special rates shall be open to and allowed all persons * * * alike * * * except in special cases * * * when the approval of the said Commissioner shall be obtained in writing."

The plaintiff proved that it shipped a certain number of tons of freight and paid a certain rate and also proved that another shipper was charged a less rate. If plaintiff had been accorded the same rate it would have paid $5,184.30 less than it actually paid. A jury returned a verdict in favor of the plaintiff for this sum. In the Supreme Court the defendant contended that "there was no sufficient evidence to support the verdict and especially as to the amount of damages." The Supreme Court said (page 697):

> "The damages sustained by plaintiffs were measured by the amount of such rebate which should have been allowed to them. The question whether they lost profits upon the sale of this coal by reason of the non-allowance of such rebates was too remote to be made an element of damages."

In *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, 202, the Supreme Court distinguishes the *Goodridge* case from the case then under consideration as follows:

> "*Union Pacific R. R. Co.* v. *Goodridge,* 149 U. S. 80, 709, involved the construction of the Colorado statutes, which did not, as does the Commerce Act, compel the carrier to adhere to

> published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for failure to do so made the carriers liable for three times the actual damages sustained or overcharges paid by party aggrieved."

So here the Constitution required that the property of plaintiff's assigns should be transported at charges not exceeding the charges to any more distant point. By collecting the higher rate for the lesser distance the law was *ipso facto* violated in the same way that it was violated under the Colorado statute where the plaintiffs were charged a higher rate than was charged other shippers.

4. That it is wholly immaterial whether formal protest was made at the time of the payment of the illegal charges.

This matter is not referred to in the supplemental brief of plaintiff in error.

5. The evidence sought to be introduced by plaintiff in error fails to show that the Railroad Commission relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than the shorter haul.

This matter is fully discussed at pages 103 et seq. of our brief.

At the oral argument counsel referred to an opinion of the Railroad Commission filed on the preceding day in which the Commission states that on *February 15, 1912*, the Commission "issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the Commission." (Page 48, supplemental brief of plaintiff in error.)

In its opinion the Commission does not state the terms of the order referred to.

Counsel for plaintiff in error had a copy of the order of February 15, 1912, before them in court at the trial, but it is evident they did not deem that the order authorized plaintiff in error to charge the rates involved in this action for they did not offer it in evidence in support of their seventh special defense. *As the opinion of the Commission does not attempt to construe any order involved in this case, we are at a loss to know just why it is referred to by counsel for plaintiff in error.*

The writer of this brief was under the impression at the time of the oral argument that the Commission in its opinion was referring to its order of January 16, 1912, sought to be introduced in evidence by the plaintiff in error.

The opinion of the Commission states that "Previous to the order of February 15, 1912, an extended investigation was made by the Rate Department of the Commission." This opinion does not state that this "extended investigation" was made prior to January 16, 1912, the date of the order sought to be introduced in evidence by plaintiff in error.

Even if the opinion of the Commission had stated that the investigation was made prior to January 16, 1912, it would be immaterial here as the fact of such investigation should have been proved at the trial by competent evidence.

Even if this opinion had stated that an investigation was made prior to January 16, 1912, it would not have been admissible in evidence at the trial as it was made in a proceeding to which the defendant in error was not a party and would have come within the rule against hearsay evidence.

In this case it was incumbent upon plaintiff in error to prove (1) that it applied to the Commission for authority to charge the lesser rates for the longer distance specified in each of the causes of action numbered from 86 to 120, both inclusive; (2) that the Commission investigated these applications; and (3) that after investigation and in special cases, the Commission authorized plaintiff in error to charge the lesser rate for the longer distance.

Plaintiff in error proved that applications were filed on December 30, 1911, but wholly failed to prove that any investigation was had or that the Commission had made an order authorizing it to charge the rate to the more distant point specified in each of

the causes of action, or that the Commission had granted any of its applications.

Although the effect of the proceedings before the Commission and of the orders made by that body, and especially of the order of January 16, 1912, are fully discussed in the brief of defendant in error, it may be of use here to refer further to the order of January 16, 1912, in view of the opinion of the Commission filed on November 8th.

The order of January 16, 1912, appears at page 424 of the Record and is copied at page 113 of the brief of defendant in error. In order to determine just what the Commission intended by its order of January 16, 1912, it is necessary to examine its notice of October 26, 1911, and its order of November 20, 1912, and also its opinion in the *Scott, Magner & Miller* case (2 C. R. C. 626) which was decided April 15, 1913, about a year and three months after the making of the order of January 16, 1912.

Although latest in date, let us first consider the opinion in the *Scott, Magner & Miller* case. In that case, the Commission expressed the view that prior to October 10, 1911, (the date of the amendment to the Constitution), it had the power under Section 22 to establish rates which contravened the provisions of Section 21. This matter has already been referred to. The rates involved in the *Scott, Magner & Miller* case had never been established by the Commission, but nevertheless the Commission went out of its way to express such view, although it did finally say that it would not consider the matter further because it was not involved (2 C. R. C. 631). This opinion was rendered after this action and many other actions

involving violations of the provisions of the Constitution, both before and after the amendment, had been filed in the State courts.

We will assume that the Commission held the same view when on October 26, 1911, it notified all carriers "To present list of deviations and to justify exceptions." (Record, Vol. 2, p. 399.) This order assumed that the carriers were legally entitled on October 10, 1911, the date of the amendment, to charge higher rates for the shorter than for the longer distance. Instead of construing the amendment to the Constitution as affording an opportunity to the carriers to obtain relief from a prohibition which theretofore had been absolute the Commission construed it as prohibiting in the future rates which theretofore had been lawful.

With this erroneous view as a basis, the Commission then adopted the further erroneous view that the prohibition of the amended Section 21 did not become operative upon the adoption of the amendment of October 10, 1911. In view of the fact that in adopting the long and short haul clause of the 4th section of the Interstate Commerce Act, the people of California had eliminated the provision of Section 4 continuing in effect existing rates pending the determination of the applications of the carriers for relief, this second error is almost as glaring as the first one.

The notice of October 26, 1911, gave the carriers until January 2, 1912, to file applications for relief. It did not state what the result would be if such application were not filed before that date.

On November 20, 1911, the Commission made an order purporting to grant to carriers

> "permission until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments, higher rates or fares at intermediate points." (Record, Vol. 2, p. 404.)

It is the custom of the carriers to file from time to time supplements to their tariffs containing rate changes and this order purported to allow the filing of supplements containing higher charges to intermediate points.

The order of November 20, 1912, contained the further provision "that the Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912."

At the hearing held on January 2, 1912, no evidence was introduced and the meeting adjourned without day.

We come now to the order of January 16, 1912 (Record, Vol. 2, p. 425), which plaintiff in error contends authorized it thereafter to charge the higher rates to the less distant points. This order commenced by stating that "the time heretofore granted to railroad and other transportation companies" to file applications for relief "be and the same is hereby extended to February 15, 1912." It contained a further provision which counsel for plaintiff in error

contend authorized the collection after January 16, 1912, of the lower charge for the longer distance. This further provision is as follows:

> "Until February 15, 1912, the railroad and other transportation companies *may file for establishment with the Commission* in the manner prescribed by law and in accordance with the Commission's regulations *such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points:* Provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. *The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*"

Like the order of November 20, 1911, *it merely purported to give carriers permission to "file for establishment * * * such changes in rates and fares as would occur in the ordinary course of their business" and provided that said "changes" could specify higher rates at intermediate points.* These "changes" are the supplements or amendments to their tariffs which are filed from time to time by the carriers, and the order purported to permit such supplements to specify higher rates at intermediate points. The order was in terms and effect precisely similar to the order of November 20, 1911. It related to the "changes" or supplements merely and had no refer-

ence to the applications filed by the plaintiff in error on December 30, 1911. *It did not purport to grant any applications for relief, but purported merely to permit carriers in the supplements to their tariffs which they filed from time to time to specify higher charges to intermediate points.* It is not contended by plaintiff in error that any of the charges involved in this case were contained in any supplements filed in pursuance of such permission.

When the Commission made its orders of November 20, 1911, and January 16, 1912, it assumed that it was legal prior to October 10, 1911, for the carriers to maintain higher rates for the shorter distance. This Commission, however, has never stated why it assumed that the prohibition did not become operative when the Constitution was amended on October 10, 1911. It contained an absolute prohibition with a proviso that "upon application to the Railroad Commission * * * such company may in special cases, after investigation, be authorized to charge less for longer than for shorter distances for the transportation of property." According to the view of the Commission expressed in the *Scott, Magner & Miller* case, any rates established by the Commission and in existence on October 10, 1911, which contravened the prohibition of Section 21, were legal. According to the assumption of the Commission, the status of such rates was precisely similar to the status of interstate rates in existence prior to June 10, 1910, upon which date Congress amended Section 4 of the Interstate Commerce Act so as to prohibit the charging of less for a longer than for a shorter distance, except when upon application of the carrier the Interstate Commerce Commission, after investigation and in special

cases relieved the carrier from the effect of the prohibition. But Congress, in order to prevent the prohibition going into effect at once, inserted a proviso reading as follows:

> "Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

By its orders the Commission assumed the right to add to the prohibition and proviso of the Constitution a further proviso somewhat similar in effect to the second proviso of Section 4 *of the Interstate Commerce Act which the people of California had not made a part of Section* 21.

Not only is it clear that the order of January 16, 1912, did not grant the plaintiff in error the right to charge the rates specified in Paragraphs IV of each cause of action, but *it is equally clear that the Commission in making the order had not the slightest intention of granting any applications for relief. Its notice of October* 26, 1912, *its order of November* 20, 1911, *and the order of January* 16, 1912, *itself, positively and absolutely negative any such intention.*

The Commission assumed that the carriers had the right to continue to charge the lesser rate for the longer distance until such time as the Commission, in its discretion, should order them to cease. It as-

sumed that the tariffs on file October 10, 1911, specifying higher rates to intermediate points, were valid and that the amendment to the Constitution of October 10, 1911, did not of its own force prevent the carriers from charging more for transportation to intermediate points. The order of January 16, 1912, merely purported to permit the carriers to file supplements to such tariffs containing higher rates to intermediate points, provided the discrimination against the intermediate points was not made greater than that "existing" on October 10, 1911.

Counsel for plaintiff in error have spent much time in arguing that the Commission could conduct an "*ex parte*" investigation and have also referred to the statement of the learned Judge of the trial court to the effect that the Constitution required the orders for relief to be preceded by an investigation. But the learned Judge also held that irrespective of an investigation the orders did not authorize the charges involved in this action.

Even if the order of January 16, 1912, had in terms granted the plaintiff in error permission to charge the lesser rates for the longer distance, it would not have constituted an order of relief under the Constitution as *it expressly stated that the very matters which had to be determined by the Commission before such an order could be made were not determined.* Of course, as we have seen, the order did not purport to authorize the charging of any of the lesser rates for the greater distances mentioned in the complaint, or to grant any of the applications of the plaintiff in error. After granting the carriers permission to file for establishment with the Commission "such changes in rates and fares as would occur in the ordinary

course of their business," the order of January 16, 1912, provided (Record, Vol. 2, p. 426):

> "The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission *or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*"

Before the Commission had jurisdiction to grant an order of relief, it was necessary that the applicant should prove and the Commission should find that the higher rate to the intermediate point was reasonable. We do not mean to say that an express finding was necessary, but we do mean that some substantial evidence must be introduced in support of the application before the Commission has jurisdiction to make the order of relief which presumes that such finding was made. The investigation provided for by the amended Section 21 of the Constitution was in its nature the same as that provided for by the amended Section 4 of the Interstate Commerce Act. *In construing the provisions of Section 4 the Interstate Commerce Commission has held that before an order of relief could be granted, the carrier must prove the alleged excuse for the lower charge for the greater distance, and also the reasonableness of the rate to the intermediate point.*

In *Re Application of Southern Pacific Company For Relief, under the provisions of the Fourth Section* 22, I. C. C. 366, 374, the Interstate Commerce Commission said:

> *"It would seem, therefore, fundamental in the enforcement of the fourth section, that a carrier*

> *shall make proof, not only of water competition in this case, but of the reasonableness of the rates applied to intermediate points."*

In the *Intermountain Rate Cases,* 234 U. S. 476, 485, the Supreme Court with reference to the duty imposed upon the Interstate Commerce Commission in the matter of the investigation provided for by the Fourth Section, said:

> "the authority of the Commission to grant or request the right sought is *made by the State to depend upon the facts established."*

The provisions of the Fourth Section and of Section 22 of Article XII of the Constitution insofar as they relate to the investigation by the Commission are identical. The Fourth Section does not state that the power to grant relief depends upon the facts established; but such is the necessary result of the provisions in relation to the applications of the carriers and the investigation by the Commission. Moreover the provisions of the Interstate Commerce Act are not necessarily mandatory whereas those of the Constitution of California are.

We have never maintained, nor did the District Court hold, that the investigation had to be an investigation "corresponding to the procedure in a court of record." *The District Court took the only view possible considering the terms of the order, and the mandatory and prohibitory provision of the Constitution that an order of relief could be made only after investigation.*

Although the investigation contemplated by the Constitution may be *ex parte* in the sense that there

need be no adverse party represented thereat, *it is incumbent upon the applicant to show affirmatively a good and sufficient excuse for charging less for the longer distance and also to show affirmatively the reasonableness of the higher charge for the shorter distance.*

Although the only parties to the proceeding are the applicant and the Commission, representing the interests of the public, the Commission *must require the applicant to prove its case.* If substantial evidence is introduced by the applicant the courts cannot say that the Commission erred in granting the application in whole or in part as the duty of weighing the evidence is vested in the Commission, but upon the clearest principles of law an order of relief made by the Commission without the production of any evidence is made without investigation and is without jurisdiction and void. *The record in this case shows that not one iota of evidence was introduced on behalf of the plaintiff in error in support of its applications.*

The word "investigation" necessarily means in view of the fact that it follows the application of the carrier, that the Commission shall receive evidence as to the merits of the application.

The Commission could not take notice of the fact or extent of the alleged water competition at Los Angeles, nor could the Commission without evidence know what was a reasonable rate to the intermediate points. The opinion of the Commission referred to at the oral argument of this case states that "an extended investigation was made by the Rate Department of the Commission, under the Commission's instructions and supervision, with reference to the deviations from the long and short haul clause."

Such is clearly not the investigation contemplated by the Constitution. That investigation contemplates that the applicant shall present evidence in support of its application and in substantiation of the allegations thereof. All that the Commission had before it in the "investigation" conducted by its rate department were the tariffs on file and the applications stating that relief should be granted on certain alleged grounds.

An investigation as to the validity of these grounds was a jurisdictional prerequisite to any order authorizing the applicant to deviate from the prohibition. The Commission had not jurisdiction to make such an order without the investigation, and even if it had attempted to make an order granting relief such order would be annulled on *certiorari* upon proof that the investigation contemplated by the Constitution had not been made.

We do not believe that the Commission, when it made the orders of November 20, 1911, and January 16, 1912, for one moment supposed that they could make the order granting relief provided for by the Constitution without proof of the very matters referred to by the Interstate Commerce Commission and the Supreme Court in the *Intermountain Cases, supra.* The orders themselves clearly indicate that the Commission deemed that such proof should be made. The fact is the Commission, when it made such orders, assumed that it had the power pending investigation, to authorize deviations from the prohibition without investigation, or to put it another way, that the carriers were not obliged to observe the constitutional prohibition until the Commission so ordered. The Commission now realizes, that, in

making these orders, it proceeded under an erroneous view of the law and that such orders *cannot be sustained upon the theory upon which they were unquestionably made.* So realizing the Commission by its opinion filed on the 8th instant seeks to sustain them as orders made after investigation when, as a matter of fact, they were made under the belief that no investigation at all was necessary in order that they should be valid, and were never intended to be orders made after investigation.

In the recent decision of the Supreme Court of California in *Great Western Power Co.* v. *Pillsbury,* 49 Cal. Dec. 667, was an application for a writ of *certiorari* to review an award made by the Industrial Accident Board. A provision of the Act conferred upon the Board power to make an award of damages to a person killed or injured, except in cases where the death or injury was caused by the willful misconduct of the person killed or injured. The Industrial Accident Board had found that one Mayfield was killed and that the killing was not the result of his willful misconduct. The award was set aside by the Supreme Court upon the ground that the evidence presented to the Board showed conclusively that such person had been guilty of willful misconduct. The Supreme Court said:

> "When the Board had power to make and award only upon given facts, and there is no evidence whatever to show that existence of these facts a finding that they do exist cannot foreclose inquiry by a court under a writ of *certiorari.*"

So under Section 21 of Article XII of the Constitution where the order of the Commission granting

relief *was made to depend upon an investigation an order granting relief without the investigation contemplated would be annulled on certiorari.*

Not only does the evidence introduced in this case show that there was no investigation, but, as we have already seen, the order of January 16, 1912, expressly states that the "changes" filed by the carriers in pursuance of the permission granted by the order "will be subject to investigation and correction" and that the Commission "does not concede the reasonableness of any higher rates to intermediate points."

The order of January 16, 1912, purported to grant to carriers permission to file *thereafter* "changes in their tariffs containing higher rates to intermediate points." As the supplements were not filed at the time the order was made, it of course would have been impossible for the Commission to have determined that the rates to intermediate points therein to be specified were reasonable. The fact of the matter is, as most clearly appears from the order of the Commission, there was not the slightest intention on the part of the Commission that the order should in any sense be an order granting relief. The Commission assumed that pending the investigation and determination of the applications it had the power to permit the carriers to violate the prohibition of the Constitution. The order itself shows that the very matters, the determination of which were necessary to a relief order, were not passed upon by the Commission, nor indeed could they have been as the Commission was wholly in the dark as to what rates would be filed by the carriers in the supplements to their tariffs. As we have already seen there is no contention that any of the rates involved in this case were

specified in any of the "changes" or supplements which may have been filed by the plaintiff in error in pursuance of the "permission" granted by the order of January 16, 1912.

The opinion of the Commission in the *Scott, Magner & Miller Case* was rendered three months after this action was commenced. The proceeding in which the opinion was rendered was commenced after the filing in the State courts of the suits involving charges collected in violation of the constitutional provisions. It is the custom of the Railroad Commission in making investigations to notify all persons who may be even indirectly interested in the result so that such persons may, if they desire, be present to protect their interests. This organization comprising a large proportion of the shippers in the San Joaquin Valley, the persons most directly interested in the matters concerning which the Commission expressed its view, was never notified by the Commission or by plaintiff in error that that body had the legal phase of the matters under consideration and had no opportunity by their counsel to present any argument. Likewise in the matter determined by the Commission the day before the oral argument, no notification, formal or otherwise, was ever addressed to this organization or to its counsel, although the Commission knew that the learned Judge of the District Court had held that the orders introduced in evidence in this case did not constitute orders of relief under the Constitution, and also knew that the question was pending in this Court on writ of error to the District Court. Counsel for defendant in error knew nothing of the proceeding until the opinion filed therein was referred to at the oral argument. The complaint for reparation in the

case determined by the Commission on November 8th, was filed on October 22nd, the hearing was held on November 1st, and the decision rendered and opinion filed on November 8th, the day preceding the oral argument before this Court. This proceeding was begun while counsel for plaintiff in error were preparing their brief which was filed on October 29th. Never before in the history of the Commission, so far as we can learn, was a "contested" matter heard and determined with such extraordinary rapidity.

As stated above, the proceeding of *Fresno Traffic Association* v. *Southern Pacific Company, et al.,* was commenced on October 22nd. On October 25th the answer of the Southern Pacific Company was filed, which admitted all of the allegations of the complaint with the exception of the allegations that the claims were assigned to the plaintiff and the allegation that the Commission had not authorized the higher charge for the shorter distance. On the same day that the answer was filed the Commission made an order reading as follows:

> "The Commission being of the opinion that public convenience and necessity require a hearing in the above entitled proceeding on less than 10 days' notice, you are hereby notified that a hearing has been set for Wednesday, October 27, 1915, at 10 A. M."

This notice and order was addressed to the parties to the proceeding. On October 27th the hearing was postponed to November 1st.

At the hearing on November 1st, Mr. Hill, one of the representatives of the complainant, stated that the complainant based its case upon the decision of Judge Van Fleet, rendered in the case at bar. There-

upon the defendants admitted the assignment of the claims as alleged in the complaint. The question then arose as to what, if any, evidence the complainant was required to present to the Commission.

Mr. Commissioner Loveland said:

> "The order is for Mr. Hill to prove what he has claimed, and all he has to do is to introduce the decision of Judge Van Fleet; that proves it as far as he can prove it."

Mr. Hill thereupon offered the decision of Judge Van Fleet in evidence, whereupon the defendants proceeded to show that the rate experts of the Commission had "investigated" the matter in the manner stated by the Commission in its opinion filed on November 8th.

When this testimony was all in Mr. Commissioner Loveland said: "Do you desire to submit this case or do you want to argue it, gentlemen?" Mr. Harris, representing the complainant replied, "I don't think we do. Of course, it is submitted without argument, if that is the case, inasmuch as I am wholly unfamiliar with the matter."

When the case was submitted Mr. Commissioner Loveland made the following statement:

> "Now every one of the five members of this Commission believes that it made such investigation and issued such orders. All that was presented to Judge Van Fleet was the Commission's orders that were read into the record. He was not shown that these orders were based upon a very, very serious and long continued investigation. We didn't show that."

Mr. Sanborn, one of the Commission's rate experts, testified on behalf of the defendants. In the course of giving his testimony Mr. Sanborn said:

> "At that time you will recall, back in 1911, there was a hard and fast long and short haul provision * * * Every one advocated an amendment to the Constitution that would give the Commission permission or power to relieve the carriers from the absolute long and short haul provision."

It is quite evident that the Commission did not receive its legal advice from Mr. Sanborn.

The above quoted statements are taken from the reporter's transcript of the proceedings on file with the secretary of the Commission.

Counsel for plaintiff in error contend that Section 18 of the Act of 1911 (the Eshleman Act), authorized the carriers, after the amendment to the Constitution of October 10, 1911, to charge a higher rate to intermediate points until the Commission should otherwise order. This contention is based on Section 18 of the Act of 1911 and the provisions of the amended Section 22 of Article XII of the Constitution referring to the Act of 1911. Section 18 of the Act of 1911 contains the following provision:

> "All rates and charges for the transportation of passengers and freight, and all classification established by the Commission shall remain in effect until changed by the Commission."

The amended Section 22 of Article XII contains the following provision with reference to the Act of 1911:

> "The provisions of this section shall not be construed to repeal in whole or in part any existing law *not inconsistent herewith,* and the 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. *And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution* and of all other provisions adopted concurrently herewith."

It is said that because of this reference to the Act of 1911 in Section 22, the carriers were entitled to ignore the prohibition of Section 21 against charging less for the longer distance until the Commission should "change" the rates in effect on October 10, 1911. This argument is based on the contention that higher rates to intermediate points were legal prior to October 10, 1911, and falls with that contention.

Assuming for the purpose of the argument that higher rates to intermediate points could be legally charged prior to October 10, 1911, the argument is equally unsound.

By the reference to the Act of 1911 in the amended Section 22, it was clearly intended that that Act and other existing acts should not be repealed by the amendment to the Constitution unless they were *inconsistent therewith.*

But higher rates to intermediate points were directly contrary to the provisions of the amended Section 21, which provided that they could be charged only when the Commission should so authorize after investigation.

The reference to the Act of 1911 in the amended Section 22 states that the Act of 1911 "shall have the same force and effect as the same had been passed after the adoption" of the amended sections of the Constitution. If the Act of 1911 had been passed after October 10, 1911, it would hardly be contended that the provision that "rates established by the Commission shall remain in effect until changed by the Commission" in any wise impaired or affected the long and short haul prohibition of the amended Section 21, adopted on October 10, 1911. The provision would be held to relate to rates *thereafter* established by the Commission.

The above quoted provision of Section 18 of the Act of 1911 did not really add anything to that Act as rates established by the Commission necessarily remained in effect until changed by the Commission. Such would unquestionably have been the construction of the Act of 1911 if that part of Section 18 had been omitted.

The provisions of the amended Section 21 of Article XII of the Constitution providing that upon "application to the Commission" a carrier "may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of property" are mandatory and prohibitory. Section 22 of Article I of the Constitution providing that, "The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise," applies with all its force to the amended Section 21 of Article XII. Construing the provisions of Section 21 of Article XII in the light of the provisions of Section 22 of Article I, it follows

that an order of relief can be made only upon application, only after investigation, and only in special cases. The Constitution establishes the method of obtaining relief and that method is necessarily exclusive. In *Knight* v. *Martin,* 128 Cal. 245, the Supreme Court of California considered the provisions of Section 5 of Article XII of the Constitution, relating to the election and qualification of county officers. That section provides that the Legislature

> "shall regulate the compensation of all such officers in proportion to duties, and for this purpose *may* classify the counties by population."

In holding unconstitutional an act of the Legislature which attempted to fix the salaries of district attorneys without reference to the classification of the counties by population, the Supreme Court, after referring to the above quoted provision of the Constitution, said:

> "When this language is considered with that of Article I, Section 22, of the same instrument, which declares that 'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,' *the conviction is irresistible that the Constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers,* and that mode is to adjust the compensation in accordance with their respective duties under a classification of counties by population made for this purpose. *To hold that the provision concerning classification of counties is permissive merely would be to deny to Section* 22 *of Article* I *its plain effect in a case calling for its application.*"

Counsel for plaintiff in error in their supplemental brief again assert that it was competent for the Com-

mission, after the amendment to the Constitution of October 10, 1911, to establish rates in violation of the long and short haul clause and in support of their contention cite *Pacific Telephone and Telegraph Co.* v. *Eshleman,* 166 Cal. 640.

As pointed out on page 118 of our brief, this contention is wholly irrelevant, as there is no claim that the Commission, after October 10, 1911, established any of the rates involved in this case.

Moreover, it is plain that such a statute would practically supersede or repeal the long and short haul clause of Section 21 of the Constitution as amended October 10, 1911, which requires that the higher rates to intermediate points can be changed only when upon the application of the carrier the Commission, after investigation, so authorizes. This matter was referred to at page 120 of our brief.

Counsel for plaintiff in error state in reply to our argument:

> "That this does not follow under the decision of the California Supreme Court above referred to *Pacific Etc. Co.* v. *Eshleman,* supra, which holds that the section with regard to unconstitutionality only means that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, and that the legislative authority to confer *any kind of additional* powers is plenary and unlimited by any constitutional provision." (Supplemental Brief, p. 65.)

The provision of the Constitution referred to is as follows:

> "No provision of this Constitution shall be construed as a limitation upon the authority of

> the Legislature to confer upon the Railroad Commission *additional powers* of the same kind or different from those conferred herein, which are not *inconsistent* with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

With reference to the charging of more for the shorter than for the longer distance the Constitution confers upon the Commission the power to investigate the application of the carrier for relief and in special cases, after such investigation, to authorize such charges, and from time to time to prescribe the extent to which the applicant might be relieved from the prohibition.

It is obvious that an act of the Legislature authorizing the Commission to establish higher rates for the shorter distance without the application or investigation required by the Constitution would be inconsistent with the Constitution.

The Supreme Court in *Pacific Etc. Co.* v. *Eshleman, supra,* did not, as counsel contend, say that the provision of the Constitution that the additional powers conferred upon the Commission by the Legislature should not be inconsistent with the Constitution only means that the powers so conferred must not "curtail" any of the powers vested in the Commission by the Constitution. There is no language used which can possibly be distorted into such a statement.

Necessarily an act curtailing the powers conferred by the Constitution would be inconsistent therewith.

So when with reference to a specific matter the Constitution itself has restricted the powers of the Commission by specifying their extent and the manner in which the Commission shall exercise them, any enlargement of its powers with reference to that matter would be equally inconsistent with the Constitution. If the contention of plaintiff in error were sound the Legislature could enact that in every case where an application for relief was filed it should be granted by the Commission. Such a provision would not "curtail" the power of the Commission, but it would be inconsistent with the powers conferred by the Constitution, and would in effect repeal the constitutional provision conferring upon the Commission certain powers and duties with reference to charges contrary to the prohibition of the Constitution.

In fact, the provision that the Legislature may confer "additional" powers not inconsistent with the powers conferred by the Constitution necessarily has application only to "additional" powers, and does not authorize any curtailment of the powers conferred by the Constitution. It provides that "additional" powers may be conferred provided they are not inconsistent with the powers conferred by the Constitution.

Counsel's statement quoted above to the effect that "the legislative authority to confer *any kind* of additional powers is plenary and unlimited by any Constitutional provision" entirely disregards the very terms of the provision, which only authorizes the conferring of *such kinds* of additional powers as are not inconsistent with the powers conferred by the Constitution.

From the foregoing, the following conclusions clearly appear:

1. That the order of January 16, 1912, did not purport to authorize the greater charge for the longer distance referred to in Paragraph IV of any of the causes of action numbered 86 to 120.

2. Assuming for the sake of the argument that it had so purported, the order would be void because the evidence shows that the Commission did not make the investigation required by the Constitution.

6. The Railroad Commission had no power to establish rates which contravened the Constitutional Provision, and if it assumed to do so its act was void.

Prior to the amendment of October 10, 1911, the Constitution provided that "Persons and property transported over any railroad or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing."

In the language of the Supreme Court of California, in *Matter of Maguire,* 57 Cal. 604, this constitutional provision "imposed a restrain on every law-making power in the state, whether an act of the legislature, or an ordinance or by-law of a municipal corporation. *It is a positive declaration, made by the sovereign authority, that whatever may be done under the legislature power, in any and every shape or form, shall never by direct or indirect action" authorize a carrier to charge a greater sum for the transportation of the same class of property for a shorter distance than the carrier charges for such transportation for a longer distance over the same line in the same direction, or deprive any person transporting goods by a common carrier of the right to have his goods carried to any point at charges not exceeding those made for transportation to a more distant point.*

The provision of the Constitution fixing the rate for the greater distance as the maximum legal rate for the shorter distance is most clearly worded, and the effect of the decisions of the Supreme Court of the State construing the provision of Section 22 of Article I of the Constitution to the effect that "The

provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," is absolutely unmistakable.

Nevertheless further argument is made in the supplemental brief of the plaintiff in error that the Commission had the power to treat this constitutional provision merely as directory. It is said that it should be construed *"in pari materia"* with the provision of Section 22 of Article XII empowering the Commission to establish rates and that so construed the Commission had authority to establish rates in contravention thereof. As held by the learned Judge of the District Court:

> "There is nothing in substance in the claim that Section 22, when construed *in pari materia* with Section 21, is a limitation upon the latter or in any respect modifies the provisions of the clause in question. Obviously the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21, and it is only rates so fixed that are to be deemed conclusively just and reasonable, either as an obligation upon or protection to the carrier. Any other interpretation of the sections would be in violation of cardinal rules of construction."

As said by the Supreme Court in *Matter of Maguire, supra,* "what is provided in one section may be restrained by the provisions of another."

In the supplemental brief it is said that the rate for the longer haul was established by the Commission. It is said the "carrier had no control over the through rate."

Heretofore, the plaintiff in error has been insisting that the Commission "established" the rate for the

shorter distance and that such "establishment" warranted the plaintiff in error in charging such rate, although a lesser charge was made for the greater distance. Now there is added the further contention that the lesser rate for the longer distance was also established.

Not until now did it occur to plaintiff in error to contend that the alleged establishment of the lesser rate for the longer distance was an excuse for charging a higher rate for the shorter distance. Nowhere in the pleadings is there any allegation that the lesser rate for the longer distance was established by the Commission. The complaint does not so allege nor is any such allegation contained in the answer or in any of the alleged separate defenses therein set up.

We may assume, however, that the lower rate for the longer distance was so established, but plaintiff in error is not helped one whit thereby. When the Commission established the lower rate for the longer distance, it became the maximum legal rate for the shorter distance.

The constitutionality of any rate established by the Commission is determined by the same rules which apply in the case of a statute passed by the Legislature. A rate established by the Commission is in legal effect a special statute.

If the Commission established a lower rate for the longer distance, such establishment by implication repealed all higher rates to intermediate points. If the Commission subsequently established a higher rate to an intermediate point, such establishment would impliedly repeal the lower rate to the more

distant point. If the Commission by a single order attempted to establish rates for both the shorter and the longer distances, and in so attempting provided that a higher rate should be charged for the shorter than for the longer distance, the whole order would be unconstitutional.

If, for example, there had been in existence a rate of 40 cents per hundred pounds from San Francisco to Bakersfield and a rate of 40 cents per hundred pounds from San Francisco to Los Angeles, and the Commission should subsequently establish the Los Angeles rate at 30 cents, the order would unquestionably have the effect of making 30 cents the maximum rate to all intermediate points.

If instead of establishing the Los Angeles rate at 30 cents the Commission had established the Bakersfield rate at 50 cents and made no order with reference to the Los Angeles rate, it would follow, the order being a later act of the rate making body, that the theretofore existing lower rate for the greater distance would be abrogated or repealed.

For the purpose of illustrating its contention, plaintiff in error refers to cause of action No. 119 (Record, Vol. 2, p. 328). In this cause of action it is alleged that plaintiff in error charged plaintiff's assignor 36 cents per hundred pounds on a shipment of rice from San Francisco to Fresno and at the same time charged 27½ cents per hundred pounds for the transportation of rice from San Francisco to Los Angeles. Plaintiff in error state:

> "Assuming, then, as we think must be assumed, that the 27½ cent rate on rice from San

> Francisco to Los Angeles (rate pleaded in Count No. 119, Complaint, Record, Volume 2, p. 328) was a legally chargeable rate on that commodity for the through haul, because it was Commission-established and because no lower rate on rice existed from San Francisco to a point beyond Los Angeles, what then was the carrier's situation? The Commission had established, as we offered to show, the rate of 36 cents per 100 lbs. on rice from San Francisco to Fresno, a point intermediate San Francisco-Los Angeles, upon the collection of which Count 119 is based (Record, Vol. 2, p. 328). Claims defendant in error the 27½ cent rate was the lawful rate to Fresno as well as to Los Angeles, because we were then, under the compulsion created by the Commission-made rate, charging 27½ cents for the longer haul."

Assuming that the 27½ cent rate was as counsel say "commission-established," then it was in legal effect the commission-established maximum rate to all intermediate points on the same line and in the same direction.

If the 27½ cent rate was established as the Los Angeles rate by an order of later date than the order establishing the 36 cent rate to Fresno it impliedly repealed or abrogated the 36 cent rate and fixed the 27½ cent rate as the maximum rate that could be charged to Fresno. If on the other hand, the 36 cent rate to Fresno was established by an order of later date than the order establishing the 27½ cent rate to Los Angeles such order in effect established 36 cents as the legal rate to Los Angeles or at least abrogated or repealed such lower rate. If such were the case, the plaintiff in error voluntarily charged the 27½ cent rate to Los Angeles.

Whether the charging of the rate for the longer distance was "voluntary" or "involuntary" plaintiff's assignor was entitled to have his property transported for the shorter distance at charges not exceeding those made for the longer distance. If the lesser rate for the longer distance was the legal rate for the longer distance then it was also the legal rate for the shorter distance, and if the higher rate for the shorter distance was the legal rate for the longer distance then the carrier by voluntarily charging a less rate assumed the constitutional obligation to deliver the property of the assignor of defendant in error at charges "not exceeding the charges" made to the more distant point.

It is immaterial in what manner the result is arrived at. The Constitution conferred upon the assignors of plaintiff in error the right to have their property transported at charges not exceeding those made for the transportation of the same class of property for a longer distance over the same line in the same direction. The answer of plaintiff in error admits that they were deprived of that right and it is wholly immaterial under what pretext they were deprived of it.

Counsel for plaintiff in error say that if the legal rate to Fresno on the shipment of rice referred to was the 27½ cent rate for the longer haul to Los Angeles that such 27½ cent rate would also be the legal rate to Bakersfield which is 107 miles further from San Francisco than Fresno is, and to Mojave which is 175 miles further.

Such is unquestionably the result of the provision of the Constitution that property shall be delivered

at any station at charges not exceeding those made for the greater distance over the same line and in the same direction.

Plaintiff in error states:

> "The through rate is claimed to be a non-elastic measure; the Commission-made intermediate rates pass away; nothing is left to regulation but the through rate."

The rate to the more distant point is the "non-elastic" measure in the sense that it cannot be exceeded by the rate to the less distant point, but it is not "non-elastic" in the sense that rates to all intermediate points must be the same as the rate to the more distant point. Such is not the case for the rates to every intermediate point may be different, the only restriction being that they shall not exceed the rate to the more distant point. The statement that "nothing is left to regulation but the through rate" is palpably erroneous. The carrier (or the Commission in the event that that body in fact establishes the rates to the intermediate points) is given the widest discretion as to what such rates should be, subject only to the restriction that a lower rate shall not be charged or established to a more distant point. No "commission-made intermediate rates" pass away which are constitutionally established.

Plaintiff in error states:

> "If the carrier were then obliged to charge not 36 cents but 'charges not exceeding' 27½ cents to Fresno, it might charge 25 cents to one and 26 cents to another, perhaps leaving the shipper to a remedy before the Commission for dis-

> crimination between shippers at Fresno, but throwing the San Joaquin Valley Rate structure into chaos."

As we have already seen the publication of the 27½ cent rate for the longer distance in contemplation of law made that the maximum rate for all lesser distances. Of course, it had no effect on any published intermediate rate which did not exceed 27½ cents but such publication automatically reduced to 27½ cents any so-called published rate which in terms attempted to fix a higher charge than 27½ cents. In jurisdictions where a greater charge for the shorter than for the longer distance is prohibited by law such has been the uniform construction of schedules or tariffs specifying a lesser rate for the longer distance. After the amendment to the Constitution of October 10, 1911, the Railroad Commission erroneously assumed that they had the power to permit a greater charge for the lesser distance pending the filing of applications by the carriers and pending investigation, but they expressly conceded that when the prohibition was effective the lesser tariff rate for the longer distance became the maximum rate for all shorter distances. By its order of January 16, 1912, sought to be introduced in evidence by plaintiff in error, the Commission provided:

> "As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said Section 21, Article XII, of the Constitution, will at once become operative, *and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included*

> *within the longer distance.*" (Record, Vol. 2, p. 425.)

Of course a carrier might, as counsel suggest, charge one shipper at Fresno more than another for the same service, but if it did so it would be guilty of discrimination. And the discrimination would be of precisely the same nature as if some shippers were charged the tariff rate and some less than the tariff rate.

As already pointed out the contention that the lower rate to the more distant point was established by the Commission was reserved for the supplemental brief of plaintiff in error. Referring to the 27½ cent rate on rice from San Francisco to Los Angeles, counsel for plaintiff in error state:

> "We were then under the compulsion created by the Commission-made rate charging 27½ cents for the longer haul."

Not only is there no allegation in the answer that the rate for the longer distance was "commission-made" but the answer contains an affirmative allegation to the effect that it was voluntarily established by the plaintiff in error. In the first special defense (Record, Vol. 2, pp. 337, 338) it is alleged:

> "That the City of San Francisco is and at all the times mentioned in said complaint was situated on tide-water, and that defendant's freight terminal in the City of Los Angeles is and at all times mentioned in said complaint was situated within a comparatively short distance from tide-water, and connected therewith by rail so that common carriers by water competed freely with defendant in the carriage of freight between San

> Francisco and the City of Los Angeles, of each and all of the properties and commodities described in Paragraph IV of each of plaintiff's separately stated causes of action. That the effect of such competition by said water carriers is, and was at all the times in said complaint stated, to hold down through rates by rail between San Francisco and Los Angeles, on all of the property and commodities referred to in plaintiff's complaint, and *to compel defendant to establish and maintain such through rates* in competition with said water carriers and at less than a reasonable rate for the service performed."

At page 59 of the opening brief of plaintiff in error complaint is made that the District Court would not permit plaintiff in error to show that the through rate "was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles."

It does not follow, because the Constitution empowers the Commission to establish rates, that the Commission has established every rate which a carrier charges. In effect, Section 22 of Article XII of the Constitution vested in the Commission the power to establish rates theretofore vested in the Legislature. Before a rate became a Commission-made rate, the Commission would have to establish it by an order in effect similar to an act of the Legislature.

In the *Scott, Magner & Miller Case,* 2 C. R. C. 626, 635, the Commission had under consideration a case where no rate for the freight movement involved had ever been established by the Commission. The Commission assumed that by its order of June 11, 1909, "receiving for filing" the tariffs filed by the carriers

it had "established" the rates therein specified. It appeared that no rate for the movement involved was specified in these tariffs. The Commission said:

> "There is no record that the Commission ever established any other rates to be charged by defendant and particularly none covering the movement in question, while the Wright Act was in effect * * * no action other than that of June 11, 1909, seems ever to have been taken during the period of the Wright Act as to any of defendant's rates in this State."

Referring further to the rates charged for the movements involved the Commission said:

> "These rates were railroad-made and not State made rates."

In making the statement that the plaintiff in error was under the "compulsion" of charging the "commission-made" rate for the longer distance, counsel for plaintiff in error probably had in mind the provision of the Acts of 1909 and 1911, requiring the carriers to file their schedules of rates with the Commission, and providing further that the carriers should charge according to the rates specified in the schedules so filed, except where the Commission after investigation established other rates in lieu thereof. These statutes required carriers to file all their rate schedules with the Commission and provided that if the Commission did not approve of any rate proposed by the carrier, it might investigate the same and after a hearing establish a different rate in lieu thereof.

The Statute of 1909 (Stats. 1909: 499) which became effective March 19, 1909, provided (Sec. 18) that every carrier should file with the Commission

and publish schedules showing all its rates. Section 19 of the Act of 1909 provided for a hearing by the Commission and notice to the carrier before the establishment of any rate different from those contained in the schedules filed by the carrier. Section 18 of the Act of 1909 also contained a provision that "no carrier shall engage in the transportation of property unless the rates upon which the same is transported have been filed and published." Section 16 of the Act of 1909 provided:

> "The said Board of Railroad Commissioners shall have the power, and it shall be their duty, to establish rates of charges for transportation by transportation companies subject to the provisions of this Act, and the order for the said rates so made shall take effect on the 20th day after the service of the same upon the transportation company affected thereby."

The filing of schedules under Section 18 did not constitute the rates therein specified Commission-made rates. The rates therein specified were carrier-made rates. They were not established by the Commission merely because the Commission did not establish other rates in lieu thereof.

The Constitution contained no provision requiring the Commission to notify the carrier prior to the establishment of any rate. It will be noted that the Act of 1909 went beyond the Constitution in providing for a hearing before the rates were established. It also went beyond the Constitution in requiring carriers to file with the Commission schedules of all their rates.

The Act of 1911 (Stats. 1911: 13) provided (Sec. 17) that within 60 days from the time the Act went

into effect all carriers should file complete schedules of their rates, and provided further that the Commission might establish such of said rates as it approved and that upon notice and after hearing it might establish others in lieu of those which it did not approve.

The provisions of the Acts of 1909 and 1911 differ but slightly. The Act of 1909 did not provide that the Commission should establish rates except in cases where it disapproved of the rate proposed by the carrier, whereas the Act of 1911 provided that the Commission should either approve the rates proposed by the carrier, or establish others in lieu thereof. The Act of 1911 contemplated a formal order establishing the rates proposed by the carrier, whereas the Act of 1909 did not.

At the trial plaintiff in error sought to introduce in evidence a letter written by plaintiff in error to the Railroad Commission under date of May 7, 1909, transmitting to the body "all tariffs published by the Southern Pacific Company which are in effect at this date." This letter was in answer to one written by the Railroad Commission to plaintiff in error "in regard to filing tariffs" with the Commission. (Record, Vol. 2, p. 517). These tariffs were transmitted for filing in pursuance of the Act of 1909 (Sec. 18) which became effective March 19, 1909, and which required every carrier "to file with the Commission and publish schedules showing all its rates."

At page 116 of the opening brief of plaintiff in error the statement is made that the list of tariffs specified in this letter "includes the tariffs evidencing all of the charges here in controversy."

Assuming the correctness of the statement of counsel that "all the charges here in controversy" were evidenced by the tariffs transmitted with the letter of May 7, 1909, from plaintiff in error to the Commission the situation was as follows: The rates involved in this action were established by the plaintiff in error some time prior to May 7, 1909. On that date tariffs containing such rates were filed with the Commission. On June 11, 1909, the Commission made its order to the effect "that the aforesaid schedules be and they are hereby received and filed by this Commission * * * and that said rates, fares and charges shall be published by said carriers respectively as required by the said Act, and shall be the lawful rates, fares and charges of said carriers respectively." (Record, Vol. 2, p. 530.) This order referred not only to the tariffs filed by plaintiff in error, but to those filed by about forty other carriers. The order of the Commission that "said rates and charges * * * shall be the lawful rates and charges of said carriers respectively" did not amount to an order "establishing" such rates. They became the lawful rates (provided they did not contravene the Constitution) because they were specified in the tariffs filed by the carriers in pursuance of Section 18 of the Act. The Act provided that upon the filing by the carriers of the schedules of their rates, the rates therein specified should be the lawful rates until others were established by the Commission in lieu thereof; the order of the Commission that they were the lawful rates was really superfluous.

Plaintiff in error, in effect, said to the Commission: "We are now charging the rates specified in these tariffs and in pursuance of the Statute of 1909

hereby file them with you." Nevertheless counsel say they were "commission-made" and that the plaintiff in error was "compelled" to charge accordingly. Clearly it is wholly immaterial whether the order of the Commission that they should be the "lawful rates" constituted them "commission-made" rates or not. Primarily and in effect they were carrier-made rates. If they were "commission-made" they were so made at the request of plaintiff in error, and if after the schedules were filed, plaintiff in error was "compelled" to charge them, such compulsion was the result of its own voluntary act in first establishing them.

Counsel for plaintiff in error say that "the California system absolutely negatives any theory of maximum rates and gives the carrier no right to vary from the rate fixed by the Commission." By this counsel mean that the carrier is not only forbidden to charge in excess of the established rate but he is also forbidden to charge less. It appears to be the contention of counsel that a constitutional or statutory provision that a carrier shall not charge *less* than the established rate is inconsistent with the provision of Section 21 of Article XII of the Constitution requiring that property be transported for a lesser distance at charges not exceeding those made for the longer distance. This contention was not made in the opening brief of plaintiff in error but is first made in its supplemental brief.

It is very certain that this contention will not bear analysis. Let us assume (which we shall hereafter show is not the fact) that the Constitution as it existed prior to October 10, 1911, contained a provi-

sion that no carrier should charge less than the rates established by the Commission. We have then the mandatory and prohibitory provision of Section 21 of Article XII that "property transported over any railroad shall be delivered at any station at charges not exceeding the charges for the transportation of property of the same class in the same direction to any more distant station." We have further the provision of Section 22 empowering the Commission to establish rates for the transportation of property, and (in the assumed case) the further provision that no carrier shall charge either more or *less* than the rates so established. (The fact is that the Constitution did prohibit the charging of more than the established rate but did not forbid the charging of less.) Counsel's contention is that the provision that the carrier shall not charge less than the tariff rate renders the provisions of Section 21 of Article XII merely directory and that the Commission in establishing rates may ignore the provisions of Section 21. But it is very apparent the assumed provision that the carrier shall not charge less than the established rate could not possibly have such effect. Its effect is no different than the provision that the carrier should not charge in excess of the established rate.

The effect of the provision of Section 21 of Article XII is very apparent. As said by the learned Judge of the District Court "obviously the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21. * * * Any other interpretation of the sections, would be in violation of cardinal rules of construction."

The restriction placed upon the carriers and the Commission by Section 21 was a very simple one. It merely required that no rates should be established or charged to a less distant point which exceeded the rates established and charged to a more distant point over the same line in the same direction. There is nothing ambiguous about the provision of Section 21 and neither the carrier nor the Commission should have had any difficulty in establishing tariffs which comformed thereto. A provision of law that no carrier should charge less than the rates established by the Commission would have had the same effect as the provision that no carrier should charge in excess of such rates. Both provisions would refer to rates established with regard to the provision of Section 21. Counsel say that if the lesser rate charged for the transportation from San Francisco to Los Angeles cannot be exceeded for transportation to Fresno that the carrier might charge one person at Fresno 27½ cents (the rate on rice for the greater distance referred to in cause of action No. 119) and another 25 cents, thereby discriminating between shippers at Fresno. But if plaintiff in error had observed the provisions of Section 21 it would have specified in its tariffs which it filed with the Commission just what the rate to Fresno was and such rate so specified would not have exceeded the rate to Los Angeles. The opportunity which counsel say exists for discrimination is due entirely to the disregard of the law either by the carrier or the Commission in permitting a tariff to be published which specified a higher rate to Fresno. If the carrier had observed the law, such opportunity to discriminate by charging one shipper at Fresno more than another would not have existed for the Fresno rate would have been

specifically named in the tariff, and it would have been a rate not in excess of the rate to Los Angeles. The opportunity to discriminate to which counsel refer was due either to the disregard of the law by the plaintiff in error or by the Commission. Counsel's argument in effect is: The law has been violated, but the plaintiff in error should escape liability for violating it because the effect of such violation is to permit the plaintiff in error to further violate the law by discriminating between shippers at Fresno.

If the effect of the invalidity of the higher rate at Fresno was as counsel say "that there was no rate on rice from San Francisco to Fresno" such effect was due to a disregard of the provisions of Section 21, and any "chaos" that would have resulted from the fact that there was only a maximum rate to Fresno would also have been due to a disregard of the Constitution. It is obvious that plaintiff's assignors cannot be deprived of the right conferred by the Constitution because the plaintiff in error disregarded the law or because the Commission may have attempted to sanction such disregard.

If the Constitution as it existed prior to October 10, 1911, had provided that no carrier should charge less than the established rate and there had been no rate on rice from Fresno to San Francisco the constitutional provision would have simply been inoperative in that case. The "chaos" which counsel say would result from the fact that the Fresno rate was merely a maximum rate would have been due simply to the fact that neither the carrier nor the Commission had established a specific rate.

The provisions of Section 21 are as plain as the English language can make them and it is obvious that neither the Commission nor the carrier would have had the slightest difficulty in establishing rates which did not disregard them. The provisions were disregarded, and plaintiff's assignors have been damaged thereby. In support of the contention that the Constitution did not "mean what it said" counsel for plaintiff in error say that the disregard of the provisions might have given the plaintiff in error an opportunity to damage other persons. Analyzed, such is the sum and substance of this argument of plaintiff in error.

Counsel suppose a case where a shipment of rice originated on the Northwestern Pacific Railroad at Santa Rosa destined to Fresno on the line of plaintiff in error. They say that "in the absence of a joint through rate between the Northwestern Pacific and the Southern Pacific from Santa Rosa to Fresno the rate under obvious and familiar principles of rate construction would be the sum of the two local rates" and that "It is manifest that the Southern Pacific Company's proportion of a rate so constructed would be 36 cents from San Francisco to Fresno." But in this counsel are obviously in error for if the Southern Pacific Company were maintaining a 27½ cent rate to Los Angeles, it would necessarily follow that the maximum rate to Fresno would be 27½ cents. However, any controversy over such a matter would have been entirely obviated if the Southern Pacific Company had not attempted to violate the Constitution by specifying in its tariff a higher rate to Fresno than it charged to Los Angeles.

It is clear, however, that the Constitution as it existed prior to October 10, 1911, did provide that the rates established were maximum rates merely. The Statutes of 1909 and 1911 provided that the rates should not be deviated from by charging less, but the Constitution as it then existed did not. It is very clear that it is wholly immaterial here whether a carrier could charge less than the existing rate, and it is equally clear that the Legislature could not impair the right conferred by Section 21 to have property transported at charges not exceeding those made for the greater distance by enacting that a carrier should not charge less than the established rate.

The Constitution prior to the amendment of October 10, 1911, provided (Section 22, Art. XII) that the Commission "shall have the power to establish rates" and also imposed a penalty on any carrier "which shall fail or refuse to conform to such rates as shall be established by the Commission, or shall charge rates in excess thereof."

The Constitution prior to the amendment of October 10, 1911, contemplated the establishment of maximum rates by the Commission; it did not prohibit a carrier from charging less than the established rate. If a carrier desired to charge less than the rate established it was at liberty to do so, provided it did not discriminate against anyone. If the provision had read "which shall fail or refuse to conform to such rates as shall be established by the Commission" it might be argued that the charging of less than the established rate was prohibited, but the express provision against charging rates in excess of the established rates shows that it was not the intention to

prohibit the charging of lower rates than the established rates.

The Supreme Court of California construed this provision of the Constitution in *Edson* v. *Southern Pacific Company,* 144 Cal. 182, 188, and held that the Commission had power to establish *maximum* rates merely. In so holding Mr. Chief Justice Beatty who wrote the opinion of the Court said:

> "We do not understand that the Railroad Commissioners do more than to prescribe the *maximum* rates allowable. Within that *maximum* a corporation may establish its own rates."

The Statute of 1909 (Stats. 1909: 499) which became effective March 19, 1909, provided (Section 18) that "no carrier shall receive or charge greater or less compensation * * * than the rate specified in the tariffs which have been filed or published." The Act of 1911 (Stats. 1911: 13) contained a similar provision (Section 40).

The Constitution as amended October 10, 1911 (Sec. 22, Art. XII), also prohibited the charging of a less rate than the rate established by the Commission so that on October 10, 1911, the prohibition against charging less than the established rate, which theretofore had been a statutory prohibition, became a constitutional one.

Counsel state it is "illogical not to say unfair" to "use as a subtrahend" a "State established rate," and the further statement is made that it was "commercially impossible" to have charged for the longer distance the rate charged for the lesser distance, and

that it would have been "confiscatory" to have "reduced" the intermediate rate to the level of the rate for the longer distance.

If the Commission, without the consent of the carrier, had established a rate to Los Angeles which was so low as to be confiscatory, plaintiff in error would not have been under the obligation to observe it, either as the Los Angeles rate or as the maximum rate to intermediate points. But if the Commission, without the carrier's consent, had established the Los Angeles rate and the carrier, without objection, accepted it as the lawful rate to Los Angeles, it was under the constitutional obligation to carry to intermediate points at charges not exceeding the rate for the longer distance. The alleged "unfairness" of the constitutional provision is a matter with which the courts are not concerned. It was deemed to be fair by the people of California and similar provisions have been deemed fair by the people of various other states who have enacted similar constitutional provisions. The House of Representatives in the Federal Congress passed a bill which contained an absolute prohibition against charging more for the shorter than for the longer distance. In fact, the charging of more for a short than for a longer distance has been universally recognized as *prima facie* unfair. The provision of the Constitution, in effect, provided that no rate for the longer distance should be so much below a reasonable rate as not to afford reasonable compensation for the transportation to all less distant points. It was, in effect, declared to be contrary to public policy to permit a carrier to engage in competition at the long haul point, if its engaging in such competition had the effect of requiring it to fix a rate

at so much less than a reasonable compensation for the services performed that a similar rate would not be a reasonable compensation for the services performed in transporting to less distant points. It would be competent for the law making power to prohibit a carrier from charging less than a reasonable rate in any case, but the constitutional provision does not go to that extent. The right of plaintiff in error engage in this kind of competition with water carriers is subject to the restrictions imposed by the law making power. The people evidently deemed it was to the public interest to discourage competition between rail and water carriers where the engaging in such competition would require the rail carrier to render services for compensation considerably less than reasonable. They may also have been skeptical regarding the claims of the rail carriers that the rates made to meet such competition were in fact less than reasonable. They may have deemed it improbable that a rail carrier would voluntarily transport freight for less than a reasonable compensation. Whatever their views were, they did make the rate for the longer distance the maximum rate for all lesser distances over the same line in the same direction. Counsel say it is "unfair" but the consensus of opinion seems to be that it is eminently fair.

Plaintiff in error states:

> "The utter confusion of counsel's argument arises from the fact that he has failed to recognize the radical distinction between the method of fixing interstate rates and the method of fixing California intrastate rates. The former are carrier-initiated and in most cases carrier-established maximum rates. The latter are Commission-initiated and established, and not maximum rates, but are moving rates—that is, rates which cannot be deviated from by the carrier."

Just to what extent California rates are "commissions-initiated" we have already seen. As we have also seen, the Constitution as it existed prior to October 10, 1911, did not prohibit the carrier from deviating from the established rates by charging less provided no discrimination resulted therefrom. The prohibition against charging less was first enacted by the Legislature in 1909. Under the Interstate Commerce Act once a tariff is filed with the Commission the carrier is prohibited from charging less than the tariff rate in precisely the same manner as he was prohibited by the Statutes of 1909 and 1911 and the Constitution as amended October 10, 1911. When the Interstate Commerce Commission establishes rates its order fixes the maximum rates, but as soon as the tariffs are filed in pursuance of the order the carrier cannot deviate from the rates therein specified by charging either more or less. Section 6 of the Interstate Commerce Act provides:

> "Nor shall any carrier charge or demand or collect a greater, less or different compensation * * * than the rates, fares and charges which are specified in the tariffs filed and in effect at the time."

We are not conscious that there is any confusion in our argument and we believe it will be apparent to this Court that plaintiff in error has not pointed out wherein it is confusing. We maintained and the District Court held that neither the Commission nor the carrier could legally establish or maintain a higher rate for a less than for a longer distance over the same line in the same direction. Such is the obvious effect of the mandatory and prohibitory provisions

of Section 21, as construed by the Supreme Court.

Although we have endeavored in our brief already filed and also in this brief to reply fully to the numerous contentions made by counsel for plaintiff in error, we believe that much, if not all, of our argument was really unnecessary. We might have referred merely to the opinion of the learned Judge of the District Court which fully answers all of the contentions of plaintiff in error. It is very apparent that plaintiff in error has made no serious attempt to show that the views of the District Court were erroneous.

So with reference to this alleged distinction between the Interstate Commerce Act and our constitutional provisions, it is wholly immaterial in considering the effect of the provision of Section 21 whether the rates are initiated by the Commission or by the carrier, or whether or not the carrier may charge less than the established rate. The constitutional provision clearly was a restriction alike upon the Commission and the carrier. Whether the rates which the Commission was empowered to establish were "initiated" by the Commission or the carrier, the Commission could not constitutionally authorize a carrier to charge more for a shorter distance than for a longer distance over the same line in the same direction.

Counsel state that the provisions of Section 21 of Article XII "for more than thirty years had been treated by the public, the Commission and the carriers as controlled by the provision of Section 22, giving the Commission the power to fix rates." The statement is also made that "the Commission had estab-

lished thousands of rates prior to October 10, 1911, in which the long and short haul principle was not observed."

If what counsel state were the fact, it would make not a particle of difference. A plain unambiguous provision of the supreme law of the State could not be rendered nugatory because for "thirty years" the carriers had succeeded in ignoring it, or because the Commission had failed in its duty, or because such of the public as were affected by its violation had submitted to the unlawful demands of the carriers. This contention in effect is that plaintiff in error acquired by prescription the right to violate the law and to deprive the assignors of defendant in error of their constitutionality conferred right to have their property transported at charges not exceeding those made for the longer distance.

It is not a fact that the Commission so construed the constitutional provision for "thirty years." The first time that the Commission ever so construed it, as far as we can ascertain, was when it rendered its decision in the *Scott, Magner & Miller case* (2 C. R. C. 626) on April 15, 1913, which was about three months after this action was commenced. Moreover, in that case the Commission, although it expressed the view that the Constitution should be so construed, expressly stated that as the matter was not involved it would not consider it further (p. 631). If the Commission so "construed" the constitutional provision when on June 11, 1909, it received for filing the tariffs filed with the Commission by the plaintiff in error, we do not know that such is the fact as the order merely stated that the tariffs filed "were received and

filed * * * and that said rates, fares and charges shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed by this Commission pursuant to the provisions of Section 19 of the aforesaid Act." The Commission had no discretion about "receiving and filing" them, and its statement that they should be the "lawful rates" was merely a statement of a conclusion of law. They became lawful rates (provided they did not violate the Constitution) when the schedules containing them were filed. The Commission probably assumed in making these schedules the carriers had observed the constitutional provisions. Prior to the enactment of the Statutes of 1909 there was no law which required a carrier to file its tariffs with the Commission. By its order of June 11, 1909, the Commission merely received for filing certain tariffs filed with the Commission but made no attempt to establish any rates different from those proposed by the carriers. The "thousands of rates" referred to by counsel are evidently the rates specified in these tariffs or in other tariffs prepared and filed by the carriers.

The first order of the Commission establishing a rate was made on November 22, 1887. On that date the rate from San Francisco to Pajaro and Watsonville was ordered reduced ten per cent. In ordering the rate reduced the Commission expressly directed that the reduced rate should be the maximum rate to all intermediate points. The order provided:

> "And in no instance, after the said ten per cent reduction, shall the reduced rate for the long haul be less than that charged for the shorter haul and that the reduced long haul rate shall be the maximum charge for the shorter haul."

(Vol. 1 of Minutes, pg. 32.)

For some reason which is not apparent the order reducing the rates was never put into effect.

Prior to the year 1908 the Commission had never established any rates except in a few isolated cases. This appears from the decision of the Commission in *Re Matter of Alleged Discrimination by Southern Pacific Company* (Decision No. 102 rendered January 12, 1909, Annual Report of Railroad Commission for the year 1908, pg. 51).

In that case the Railroad Commission decided, in view of the fact that before the date of the discrimination complained of the Commission had not except in a few isolated instances established any rates, that the penalties provided by the Constitution for charging rates in excess of the established rates could not be enforced. The Commission said:

> "In the preparation for the investigation the Attorney General had carefully examined the records of the Board of Railroad Commissioners to ascertain if the Constitutional mandate that they should
>
> > 'Establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such charges as they shall make'
>
> had been properly complied with. He found that prior to January, 1908, it had not, except in a few isolated cases, and after stating that fact in his argument, added:
>
> > 'It now follows, therefore gentlemen, that with the exception of such rates as the Com-

> mission has established, the penalty cited in the Constitutional provision does not apply.'
>
> It cannot therefore be said in this decision that the Southern Pacific Company has failed to move traffic in conformity with established rates, or has charged rates in excess thereof, because during the time comprehended in this investigation there were no established rates."

On January 17, 1908, the Commission passed the following resolution (Vol. 3 of Minutes, pg. 198):

> "*Whereas,* it does not appear from the records of this Board that the rates in effect in this State have ever been established by the Board, and
>
> "*Whereas,* such action on the part of the Board seems to be necessary to complete the placing of transportation companies within its control and jurisdiction, *Now Therefore Be It Resolved*: That the rates published by the various transportation companies in effect on their various lines, are hereby adopted as the rates of this Commission, subject to review and correction upon complaint and investigation."

Even after 1908 the Commission, as we have seen, merely "approved" the tariffs filed by the carriers. In so doing they may have assumed that if any of the tariffs specified a higher rate for a shorter distance than was specified for a longer distance the rate for the longer distance became the maximum rate for the shorter distance.

In 1908 the Attorney General of the State advised the Commission that it had no power to authorize the carriers to charge a higher rate for the shorter than for the longer distance.

We have the statement of counsel, made at page 116 of the opening brief of plaintiff in error, to the

effect that all the rates in controversy here were contained in the tariffs filed with the Commission on May 7, 1909. The fact is, however, that the lesser rates for the greater distance described in 119 out of the 120 causes of action set up in the complaint "became effective" after May 7, 1909. This appears from column 13 of plaintiff in error's Exhibit "A," appearing at page 375 of Volume 2 of the Record. In only one instance does this statement show that the lesser rate for the longer distance was "effective" prior to May 7, 1909. This instance is shown by the 23rd item in the statement. It there appears that the rate for the longer distance "became effective" June 29, 1908; but there is nothing to show that at that time it was a lower rate than the rate to the intermediate points. The statement shows that the higher rate to the intermediate points "became effective" on June 11, 1909, which was subsequent to the letter of May 7, 1909, transmitting the tariffs of plaintiff in error to the Commission for filing. In 71 out of the 120 causes of action the lesser rate for the longer distance "became effective" on some date in 1911.

7. That it was not incumbent upon the plaintiff below to prove that the Commission had not relieved plaintiff in error from the prohibition of the Constitution, because if such relief had been granted, it was a matter of defense which the law requires the defendant to plead and prove.

No reference to this matter is made in the supplemental brief of plaintiff in error.

8. No reparation order of the Railroad Commission was necessary in order to entitle the plaintiff, or its assignors, to maintain an action in the courts.

No argument is advanced by counsel for plaintiff in error in reply to the argument made under this head of our brief. Counsel merely reiterate the statement made in their opening brief that this action "cannot be maintained without first resorting to the Commission."

As we have seen, there is nothing either in the Constitution as amended October 10, 1911, or in the Public Utilities Act which so requires. On the contrary, the Public Utilities Act expressly authorizes an action in the courts for all violations of the Constitution and of the Act itself. Indeed there is a very serious quesion whether the Commission would have any jurisdiction to award reparation in a case such as this, or in a case where a rate higher than the tariff rate was charged. Not only did the District Court of Appeals in the case of *Southern Pacific Company* v. *Superior Court,* 20 Cal. App. 674, 686 (150 Pac. 397) hold that there was no necessity to obtain a reparation order from the Commission, but also stated that the courts had exclusive jurisdiction. The Court said:

> "The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

The District Court of Appeal was of the opinion that the provision of Section 22 of the Constitution that "Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and

compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory" and the provision of the Public Utilities Act that "when complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainaint therefor," related solely to cases where rate making questions were involved.

At the oral argument, counsel, in answer to a question asked by Judge Rudkin, made the following statement: "If in fact the rates contended for here were in excess of the lawful rate we do not claim that an action for an overcharge cannot be maintained." (Oral Argument and Supplemental Brief, pg. 40.) Upon further consideration, counsel fear they admitted too much, for at page 100 of their supplemental brief they state: "It occurs to us in reading the transcript that possibly Judge Rudkin had in mind that assuming the through rate to be the lawful intermediate rate, as contended by defendant in error, the shipper might sue without first resorting to the Commission. Counsel for plaintiff in error did not and does not so concede." In view of the fact that Judge Rudkin's question followed the reference to the case of *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, in which case the Supreme Court held the action maintainable in the courts with-

out any precedent action on the part of the Commission, we are at a loss to know just to what counsel supposed Judge Rudkin's question did refer.

Although counsel for plaintiff in error, in connection with this contention, refer in their supplemental brief to the Constitution and the Public Utilities Act, their contention here is based not upon Section 21 of Article XII of the Constitution providing that "nothing herein contained shall be construed to prevent" the Commission from ordering reparation on account of the collection of excessive or discriminatory charges, but upon Section 71 (a) of the Public Utilities Act which provides that when "the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount" the Commission "may order that the public utility make due reparation to the complainant therefor," and upon Section 71 (b) which provides that suit may be brought to recover the amount of the Commission's award.

The Constitution makes no reference to any suit on the order of the Commission. There is nothing in the Constitution which prevents the courts from entertaining actions to recover excessive or unlawful freight charges. This was directly held by the Supreme Court in *Southern Pacific Company* v. *Superior Court of Kern County,* 50 Cal. Dec. 36, 37, where the Court said:

> "There is nothing in either the Constitution or any of the statutes of this State to warrant the conclusion that the courts may not entertain an action for the recovery of money paid for freight when the same was collected in violation of law. The subject matter of such an action is within the jurisdiction of the courts."

The case in the Supreme Court involved charges collected in alleged violation of the long and short haul provisions of Section 21 of Article XII of the Constitution, after the amendment of October 10, 1911. This decision conclusively disposes of any contention that there is anything in the Constitution, as amended October 10, 1911, ousting the courts of jurisdiction of actions to recover excessive or unlawful freight charges. As a matter of fact, however, such contention was never made by plaintiff in error. The contention is merely that a reparation order is necessary under Section 71 of the Public Utilities Act, and is based not upon the Constitution, but upon the statute. That contention is fully replied to in our brief and need not be further referred to here.

CONCLUSION.

Both in their brief and at the oral argument counsel have stated that the questions involved in this case are novel. We believe it is apparent to this Court that not one of the contentions of plaintiff in error raises a question that has not been determined time and time again by the courts. In fact the only novelty about the case, we respectfully submit, is the novelty of a number of the contentions of plaintiff in error. It appears to have been the aim of counsel for plaintiff in error to make every contention conceivable. In most instances, the contentions are apparently abandoned for no argument in this support has been offered in answer to the argument against them. Instead of attempting to sustain the contentions made, counsel in their supplemental brief have added new contentions. In our reply briefs we have endeavored to answer fully every contention made or point suggested by counsel, with the result that the briefs on file are very voluminous. Although we have replied at length to the contentions made we feel that it was really unnecessary to have done so as practically every contention is answered in the opinion of the learned Judge of the District Court.

It is submitted that plaintiff in error has advanced no argument which tends in the remotest degree to question the correctness of the judgment of the District Court, and it is respectfully submitted that that judgment should be affirmed.

HOEFLER, COOK, HARWOOD & MORRIS,

ALFRED J. HARWOOD,

Attorneys for Defendant in Error.